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No. 71-740

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN H. ALLEN, TRUSTEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The referee's memorandum opinion (Pet. App. B-1 to B-30) and the district court's order affirming the referee are not officially reported. The opinion of the court of appeals (Pet. App. A-1 to A-9) is reported at 447 F. 2d 497.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1971, and the petition for a writ of certiorari was filed on December 6, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

55-140—72

QUESTION PRESENTED

Whether a bankruptcy court has summary jurisdiction to entertain a counterclaim by the trustee in bankruptcy against the United States for the recovery of federal taxes paid by the bankrupt within one year prior to bankruptcy.

STATUTE INVOLVED

The pertinent provisions of Sections 2a, 23, 57g and 67d of the Bankruptcy Act, as amended, are set forth in the Appendix, *infra*, pp. 7–12.

STATEMENT

Vista Liner Coast & Trailer, Inc. (Vista) was engaged in the business of manufacturing campers which are placed in the bed of pickup trucks. Between March 9, 1964, and February 18, 1965, Vista remitted to the United States $69,438.13 in excise taxes on the sale of its campers, under Section 4061 of the Internal Revenue Code of 1954 (26 U.S.C. 4061). Following the decision in *United States* v. *King Trailer Co.*, 350 F. 2d 947 (C.A. 9), in September 1965, holding that campers are not "truck bodies" within the meaning of Section 4061, the United States recognized that camper manufacturers are not, and never were, liable for the payment of these taxes (Pet. App. A–2 to A–3, B–3).

Vista was adjudicated a bankrupt in March 1965. The United States filed a proof of claim in bankruptcy for unpaid withholding of income and F.I.C.A. taxes and F.U.T.A. taxes for 1964 and 1965 in the amount of $9,569.76. The trustee objected to the gov-

ernment's claim and filed a counterclaim to recover $65,072.65 in excise taxes previously remitted by Vista within one year of bankruptcy. Alternatively, the trustee sought disallowance of the government's claim for employment taxes unless it surrendered the previously paid excise taxes (Pet. App. A–2 to A–3, B–29). The trustee never attemped to show that the excise tax cost had not been passed on to the ultimate purchasers, which is a statutory prerequisite to the refund of excise taxes previously paid by a manufacturer (26 U.S.C. 6416(a); Pet. App. A–2, B–3).

The referee held that the payments of the taxes to the United States by Vista, while insolvent and within one year of bankruptcy, constituted fraudulent transfers under Section 67d of the Bankruptcy Act, which were voidable by the trustee pursuant to Section 57g, and that the bankruptcy court had summary jurisdiction under Section 2a of the Bankruptcy Act to hear and determine the trustee's counterclaim against the United States (Pet. App. B–4 to B–30). The district court affirmed, but the court of appeals reversed, holding that the payments of the excise taxes by Vista were not fraudulent transfers and that the bankruptcy court therefore had no jurisdiction over the trustee's counterclaim (Pet. App. A–4 to A–9).

ARGUMENT

1. In his counterclaim, the trustee seeks to recover taxes alleged to have been paid erroneously by Vista prior to bankruptcy. But, where taxes have been paid

and incorporated into the Treasury prior to bankruptcy, Section 23 of the Bankruptcy Act (Appendix, *infra*, p. 9) requires the trustee to bring a plenary proceeding against the United States for their return. Section 23 vests the district court with plenary jurisdiction to determine controversies between a trustee and an adverse claimant concerning property which is not within the actual or constructive possession of the bankruptcy court subject, however, to the condition that the court's jurisdiction would be the same as if bankruptcy had not intervened. By contrast, Section 2a of the Bankruptcy Act, 11 U.S.C. 11, upon which the referee based his assertion of summary jurisdiction, limits such jurisdiction to proceedings concerning property in the actual or constructive possession of the bankruptcy court or to property held by those asserting no truly adverse claim. *Williams* v. *Austrian*, 331 U.S. 642, 650–654; *Katchen* v. *Landy*, 382 U.S. 323, 327; *Cadwell* v. *Elliott*, 319 F. 2d 598 (C.A. 9); *United States* v. *Owens*, 329 F. 2d 678, 680 (C.A. 5). See also 2 Collier, *Bankruptcy* (14th ed., 1971), Sec. 23.06[9].

Since the trustee's claim is for recovery of taxes previously paid to the United States and thus not in the possession of the bankruptcy court, it must be brought in a plenary proceeding, and such a proceeding must meet the jurisdictional conditions for obtaining a refund under the Internal Revenue Code. Those jurisdictional conditions are in Section 7422 (a) (26 U.S.C.), which requires filing of a claim for refund with the Internal Revenue Service before in-

stituting a proceeding in court,[1] and Section 6416(a)(1), which sets forth the conditions precedent to the recovery of manufacturers excise taxes claimed to have been overpaid.[2] See *United States* v. *Rochelle*, 363 F. 2d 225 (C.A. 5). It is conceded by the trustee that neither he nor Vista had met the conditions set forth in Section 6416(a)(1) (Pet. App. B-3).

2. The case does not involve, as the petitioner contends (Pet. 7–10), the question whether the bankruptcy court's summary jurisdiction, recognized in *Katchen* v. *Landy*, 382 U.S. 323, to order the surrender of a fraudulent transfer obtains when the transferee is the sovereign. As the petitioner recognizes (Pet. 7–8), the court of appeals did not need to decide that issue. The court merely held that the payments of the excise taxes, in the circumstances of this case, did not constitute fraudulent transfers. Thus, even assuming that in some circumstances the

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[1] Section 7422(a) requires that before a refund suit may be filed, the taxpayer must first file a claim for refund with the Internal Revenue Service in accordance with the applicable Treasury Regulations. Treasury Regulations on Manufacturers and Retailers Excise Taxes (1954 Code) (26 C.F.R.), Section 48.6416(a)-1(a), and (d)(1)(i), require that a claim for refund of the tax must include a statement showing compliance with the requirements of Section 6416(a)(1) of the 1954 Code.

[2] As a condition for receiving a refund of the manufacturers excise tax claimed to have been overpaid, Section 6416(a)(1) requires that the seller must show that (1) the tax was not passed on to its vendees, or (2) the taxpayer had repaid the tax to its vendees, or (3) the taxpayer had the written consent of its vendees to recover the refund. See *West* v. *United States*, 397 F. 2d 381 (C.A. 7).

bankruptcy court could order affirmative relief against the United States (cf. *Danning* v. *United States*, 259 F. 2d 305 (C.A. 9)), there was no occasion to do so in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

Bankruptcy Act (c. 541, 30 Stat. 544; 11 U.S.C. 1):

Sec. 2 [as amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 840; Sec. 2(b), Act of July 7, 1952, c. 579, 66 Stat. 420, and Sec. 1, Act of July 5, 1966, P.L. 89–496, 80 Stat. 270]. *Creation of Courts of Bankruptcy and Their Jurisdiction.*—a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

* * * * * *

(2A) Hear and determine, or cause to be heard and determined, any question arising as to the amount or legality of any unpaid tax, whether or not previously assessed, which has not prior to bankruptcy been contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction, and in respect to any tax, whether or not paid, when any such question has been contested and adjudicated by a judicial or administrative tribunal of competent jurisdiction and the time for appeal or review has not expired, to authorize the receiver or the trustee to prosecute such appeal or review;

* * * * * *

(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property in any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;

* * * * *

(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: *Provided, however,* That an injunction to restrain a court may be issued by the judge only;

* * * * *

(20) Exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy: *Provided, however,* That the jurisdiction of the ancillary court over a bankrupt's property which it takes into its custody shall not extend beyond preserving such property and, where necessary, conducting the business of the bankrupt, and reducing the property to money, paying there-

from such liens as the court shall find valid and the expenses of ancillary administration, and transmitting the property or its proceeds to the court of primary jurisdiction;

* * * * * *

(11 U.S.C. 11.)

SEC. 23. [as amended by Sec. 1, Act of June 22, 1938, *supra*] *Jurisdiction of United States and State Courts.*—a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act.

(11 U.S.C. 46.)

SEC. 57 [as amended by Sec. 1, Act of June 22, 1938, *supra*; and Sec. 1, Act of June 12, 1960, P.L. 86-349, 74 Stat. 217]. *Proof and Allowance of Claims.*

* * * * * *

g. The claims of creditors who have received or acquired preferences, liens, conveyances, transfers, assignments or encumbrances, void or voidable under this Act, shall not be allowed unless such creditors shall surrender such preferences, liens, conveyances, transfers, assignments, or encumbrances.

* * * * * *

(11 U.S.C. 93.)

Sec. 67 [as amended by Sec. 1, Act of June 22, 1938, *supra,* and Sec. 21 (e), (f), (h), and (i), Act of July 7, 1952, *supra.*] *Liens and Fraudulent Transfers.*— * * *

* * * * * *

d. (1) For the purposes of, and exclusively applicable to, this subdivision d: (a) "Property" of a debtor shall include only his nonexempt property; (b) "debt" is any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent; (c) "creditor" is a person in whose favor a debt exists; (d) a person is "insolvent" when the present fair salable value of his property is less than the amount required to pay his debts; and to determine whether a partnership is insolvent, there shall be added to the partnership property the present fair salable value of the separate property of each general partner in excess of the amount required to pay his separate debts, and also the amount realizable on any unpaid subscription to the partnership of each limited partner; and (e) consideration given for the property or obligation of a debtor is "fair" (1) when, in good faith, in exchange and as a fair equivalent therefor, property is transferred or an antecedent debt is satisfied, or (2) when such property or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property or obligation obtained.

(2) Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent; or (b) as to then exist-

ing creditors and as to other persons who become creditors during the continuance of a business or transaction, if made or incurred without fair consideration by a debtor who is engaged or is about to engage in such business or transaction, for which the property remaining in his hands is an unreasonably small capital, without regard to his actual intent; or (c) as to then existing and future creditors, if made or incurred without fair consideration by a debtor who intends to incur or believes that he will incur debts beyond his ability to pay as they mature; or (d) as to then existing and future creditors, if made or incurred with actual intent as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors.

(3) Every transfer made and every obligation incurred by a debtor who is or will thereby be rendered insolvent, within four months prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent, as to then existing and future creditors: (a) if made or incurred in contemplation of the filing of a petition initiating a proceeding under this Act by or against the debtor or in contemplation of liquidation of all or the greater portion of the debtor's property, with intent to use the consideration obtained for such transfer or obligation to enable any creditor of such debtor to obtain a greater percentage of his debt than some other creditor of the same class, and (b) if the transferee or obligee of such transfer or obligation, at the time of such transfer or obligation, knew or believed that the debtor intended to make such use of such consideration. The remedies of the trustee for the avoidance of such transfer or obligation and of any ensuing preference shall be cumulative: *Provided, however,* That the trustee shall be entitled to only one satisfaction with respect thereto.

* * * * *

(5) For the purposes of this subdivision d, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferree therein, but, if such transfer is not so perfected prior to the filing of the petition initiating a proceeding under this Act, it shall be deemed to have been made immediately before the filing of such petition.

(6) A transfer made or an obligation incurred by a debtor adjudged a bankrupt under this Act, which is fraudulent under this subdivision d against creditors of such debtor having claims provable under this Act, shall be null and void against the trustee, except as to a bona fide purchaser, lienor, or obligee for a present fair equivalent value: *Provided, however*, That the court may, on due notice, order such transfer or obligation to be preserved for the benefit of the estate and, in such event, the trustee shall succeed to and may enforce the rights of such transferee or obligee: *And provided further*, That such purchaser, lienor, or obligee who without actual fraudulent intent has given a consideration less than fair, as defined in this subdivision d, for such transfer, lien, or obligation, may retain the property, lien, or obligation as security for repayment.

(11 U.S.C. 107.)